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The Shocking Truth: Law Enforcement's Use and Abuse of Tasers and the Need for Reform

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THE SHOCKING TRUTH: LAW ENFORCEMENT'S USE AND ABUSE OF TASERS AND THE NEED FOR REFORM

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I. INTRODUCTION: SMALL DEVICE MAKES BIG IMPACT

In June 2010, an eighty-six year old bedridden Oklahoma woman was TASERed, according to police reports, for taking a "more aggressive posture in her bed" that allegedly caused the ten officers surrounding her to fear for their lives.[1] The officers have been accused of assaulting the woman and depriving her of oxygen when they stepped on her oxygen tank line before TASERing her.[2] On September 7, 2010, a school resource officer in Middletown, Connecticut TASERed a seventeen year old boy accused of stealing a beef patty from the school cafeteria.[3] In July 2009, the chief of police of Tucumcari, New Mexico "tased a 14 year old girl with epilepsy as she attempted to flee" and pierced her brain when one of the prongs went through her skull.[4] These are just a few of the recent incidents that have called into question the overzealous use of TASERs by law enforcement and security personnel.[5]

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1. *See* Complaint at 4, Varner v. City of El Reno, No. CIV-00636-F (W.D. Okla. filed June 21, 2010) (recounting officer's comments in official police report from incident). The victim is bringing claims against several El Reno police officers for being "wrongfully seized, assaulted, battered, physically harmed, humiliated, emotionally harmed, . . . cruelly injured with a Taser and imprisoned for several days without probable cause in a hospital." *See id.* at 1 (asserting multiple claims for injuries sustained during TASERing incident).

2. *See id.* at 4 (alleging that officers shot woman twice with TASER at high voltage, causing extreme pain, burns to her chest, and loss of consciousness).

3. *See* Leanne Gendreau, *Cops: Tasering Teen in Stealing Beef Patty Incident Appropriate*, NBC CONN., Sept. 8, 2010, http://www.nbcconnecticut.com/news/local-beat/Student-Tasered-Over-Stolen-Patty-Cops—102368909.html (reporting TASER incident in which school resource officer TASERed teen while being escorted from school grounds after attempting to steal beef patty).

4. *See* Laura Schauer, *Taser Use in Need of Regulation*, SILVER CITY SUN-NEWS (N.M.), Aug. 24, 2010, (documenting "disturbing pattern" of both inappropriate and excessive use of TASERs by law enforcement in state of New Mexico).

5. *See, e.g.*, Amnesty Int'l, *United States of America: Excessive and Lethal Force? Amnesty International's Concerns About Deaths and Ill-treatment Involving Police Use of Tasers*, at 46-53, AI Index AMR 51/139/2004 (Nov. 30, 2004), *available at* http://www.amnestyusa.org/countries/usa/Taser_report.pdf (compiling case studies on TASER abuses by law enforcement).

Perhaps the most publicized TASER incident thus far involved the now infamous phrase: "Don't Tase Me Bro!"[6] This catch phrase gained instant fame in 2007 when University of Florida student Andrew Meyer was TASERed by officers for refusing to leave a John Kerry speech.[7] While this quote gave Meyer his fifteen minutes of fame, it also served a much larger purpose in American culture, bringing the discussion of TASER use by law enforcement officers to the forefront of both political and popular discussion.[8]

The first TASER device was envisioned in 1969 by a NASA Scientist, Jack Cover, who wanted to create a device that could control unruly suspects without requiring officers to resort to firearms.[9] When the TASER was finally launched in 1974, it had one primary drawback: it was propelled by gunpowder, which subjected it to regulation by the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).[10] The ATF

6. *See Tasered Student Won't Be Charged,* CBS NEWS, Oct. 30, 2007, http://www.cbsnews.com/stories/2007/10/30/national/main3429866.shtml (quoting student's last words before being TASERed by several officers at public event for resisting officers' attempts to calm him down).

7. Naomi Wolf, *A Shocking Moment for Society: Tasering at University of Florida,* HUFFINGTON POST, Sept. 18, 2007, http://www.huffingtonpost.com/naomi-wolf/a-shocking-moment-for-soc_b_64909.html (denouncing TASER usage as act of violence against Meyer and scolding American public for accepting this abuse of force). Wolf further contests that making excuses for these types of incidents because they are not happening to "us" can have disastrous consequences, as history makes clear. *See* id.

8. *See, e.g.,* Mike Nizza, *Taking Sides in a Tasing,* THE LEDE: N.Y. TIMES NEWS BLOG (Sept. 19, 2007, 9:25 AM), http://thelede.blogs.nytimes.com/2007/09/19/taking-sides-in-a-tasing/ (reporting on estimated 200 person rally in Florida on September 18, 2007, to protest against TASERing of Andrew Meyer at Kerry event); *see also* Asher Moses, *'Don't Tase Me, Bro!' a Global Sensation,* SYDNEY MORNING HER., Sept. 20, 2007, *available at* http://www.smh.com.au/news/web/dont-tase-me-bro/2007/09/20/1189881651002.html (declaring that "Don't Tase Me Bro!" became instant hit worldwide with YouTube videos of incident being viewed almost three million times).

9. *See* Ron F. Wright, *Shocking the Second Amendment: Invalidating States' Prohibitions on Taser with the* District of Columbia v. Heller, 20 ALB. L.J. SCI. & TECH. 159, 162-63 (2010) (using acronym TASER inspired by his favorite childhood comic book hero Thomas A. Swift's Electric Rifle). TOM SWIFT AND HIS ELECTRIC RIFLE was a fiction novel for young adults that featured a weapon that could stun or disintegrate from a distance by shooting an electric charge. *See* J.P. Karenko, *Tom Swift and His Electric Rifle* (2005) (book review), *available at* http://www.tomswift.info/homepage/erifle.html (detailing Thomas A. Swift's adventures in which Electric Rifle was used to ward off danger); *see also* Jerry Langdon, *The Dark Lure of "Pain Compliance",* THE STAR (Toronto), Dec. 1, 2007, *available at* http://www.thestar.com/News/article/281499 (discussing sad reality that TASER is often used for pain compliance or "inflicting pain to get someone to do what you want" and has been used in many situations its inventor would never have imagined). A firearms consultant, after having been shot with a TASER, remarked that it was "the most profound pain I have ever felt. You get total compliance because they don't want that pain again." *See* Amnesty Int'l, *supra* note 5, at 6 (noting that officers experienced extreme pain after being exposed to TASER during training).

10. *See* Rick Smith, CEO, TASER Int'l, *History of TASER Devices* (Mar. 12, 2007), http://www.taser.com/research/Science/Pages/HistoryofTASERDevices.

required special permits to carry the TASER that were expensive and difficult to obtain, and limited its availability strictly to law enforcement agents.[11] In addition to these restrictions, law enforcement agencies were also hesitant to implement the technology after a failed product demonstration in Prague highlighted the early TASERs' inability to incapacitate many pain-insensitive subjects that were able to fight through the shock.[12] Due to these shortcomings and a general uneasiness about the ethical implications of using TASERs on the public, only a limited number of TASERs were sold to law enforcement agencies throughout the 1970s and 1980s.[13]

In 1993, two brothers purchased the rights to the technology and revamped the design of the TASER so that it used a compressed-gas-based propellant, instead of gunpowder, allowing it to be reclassified as a non-firearm and freeing it from ATF restrictions.[14] Since the reclassification,

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aspx (explaining limitations of early TASERs and their failure to catch on as mainstream weapons until last few decades when such design limitations were corrected).

11. *See id.* (indicating difficulty in categorizing TASER—it looked like flashlight, not gun, and "did not fit the specifications for either a pistol or a long-gun"—so it was classified as Title 2 weapon in same class as "sawed-off" shotgun). The National Firearms Act, which codified the group of Title 2 weapons (often referred to as "Class 3" weapons) included firearms such as "machine guns, short-barreled rifles, short-barreled shotguns and silencers," as well as a class of weapons called "any other weapon." *See* LEE ALSTON-WILLIAMS, DEP'T OF JUST., PRIVACY IMPACT ASSESSMENT FOR THE FIREARMS INTEGRATED TECHNOLOGY (FIT) 5 (2006), *available at* http://www.atf.gov/publications/download/pia/privacy-impact-assessment-fit.pdf (failing to define specifically what kind of weapons fall within "any other weapons" category). The ATF has explained that "any other weapons" can include such things as H&R Handyguns, Ithaca Auto-Burglar guns, Cane guns, and Gadget-type firearms and pen guns that fire projectiles by action of explosive. *See Frequently Asked Questions: Nat'l Firearms Act (NFA)—Firearms*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, http://www.atf.gov/firearms/faq/national-firearms-act-firearms.html (citing examples of "any other weapon").

12. *See* ELEC. CONTROL DEVICES, AN INTRODUCTION TO TASER ELECTRONIC CONTROL DEVICES, HISTORY, ELECTRICITY, ELECTRICAL STIMULATION, ELECTRICAL MEASUREMENTS, AND THE HUMAN BODY 19-20 (2008), *available at* http://www.ecdlaw.info/outlines/11-10-08%20Brave%20ECD%20Appendix%20FIN.pdf (detailing chronology of TASER device technologies and difficulties in marketing early TASER devices due to ATF restrictions).

13. *See id.* (discussing failure of early TASER products to meet consumer needs).

14. *See id.* at 20 (documenting success of TASER when brothers Rick and Tom Smith hired Jack Cover to design new model of TASER driven by compressed air or nitrogen). After a traffic altercation in which two of Rick and Tom Smith's close friends were shot and killed, the brothers realized there was a void in defense technology that needed to be filled with a non-lethal alternative to the firearm, which usually ended in death or serious bodily injury. *See id.* at 19-20 (aspiring to create non-lethal alternative defense weapon people could turn to for protection instead of having to use firearms); *see also* AM. CIVIL LIBERTIES UNION OF N. CAL., STUN GUN FALLACY: HOW THE LACK OF TASER REGULATION ENDANGERS LIVES 3 (2005) [hereinafter ACLU REPORT], *available at* http://www.aclunc.org/issues/criminal_justice/police_practices/asset_upload_file389_5242.pdf (declaring that lack of regulation by ATF has left TASER International "free to market its product

"Taser International has sold over 200,000 law enforcement Tasers," and in 2008 alone, it shipped 86,068 TASERs.[15]

The device, which operates on twenty-six watts of electrical output and delivers a 50,000 volt shock, works by propelling two darts up to twenty-one feet.[16] The shock delivered by the darts is "designed to override the subject's central nervous system causing uncontrollable contraction of the muscle tissue and instant collapse."[17] Amnesty International insists that these electro-shock weapons are inherently vulnerable to abuse as they can inflict serious pain at the push of a button, without leaving substantial marks.[18] Amnesty International further questions the classification of TASERs as non-lethal weapons in light of their findings that between 2001 and August 2008, 334 people in the United States died after being struck with a TASER.[19] Likewise, the United Nations stated that the use of TASERs, "provoking extreme pain, constituted a form of torture" in

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without government interference or oversight" and has led to vastly inconsistent policies across law enforcement agencies).

15. *See* Wright, *supra* note 9, at 186-87 (acknowledging substantial increase in TASER consumption by both law enforcement and individuals over past few decades); *see also* Amnesty Int'l, *supra* note 5, at 4 ("Manufacturers and law enforcement agencies deploying tasers maintain that they are a safer alternative to many conventional weapons in controlling dangerous or combative individuals.").

16. *See* Amnesty Int'l, *supra* note 5, at 4 (indicating that TASERs work by embedding probes in skin of suspect—allowing current to flow from device through wires attached to suspect—and are programmed to work in five-second bursts, but can be prolonged beyond that time if officer's finger remains on trigger).

17. *Id.* In addition, so long as the probes remain attached to the suspect, shocks can be administered repeatedly. *See id.* at 5 (explaining that TASERs are also equipped with "laser sights for accurate targeting . . . [and] have a built in memory option to record the date and time of each firing"). The TASER works by interrupting the electrical signals from the "central nervous system to the peripheral body. This interruption overwhelms the motor nervous system and causes the body to experience sudden shaking and rigidity, typically leading to a loss of balance and a fall to the ground." *See* Greg Meyer, *Conducted Electrical Weapons: A User's Perspective, in* TASER CONDUCTED ELECTRICAL WEAPONS: PHYSIOLOGY, PATHOLOGY AND LAW 1-2 (Mark W. Kroll & Jeffery D. Ho eds., 2009) (describing physiological effects of TASER on human body).

18. *See* Amnesty Int'l, *supra* note 5, at 2 (addressing difficulty of victims in seeking redress for such injuries because majority of instances leave barely visible marks on skin and cause no lasting injuries). Specifically, using the TASER in "touch" stun gun mode (applying it directly to the skin) is designed for "pain compliance" and is often used against individuals who are already in custody or under police control. *See id.* at 67 (emphasizing that while "Tasers are widely promoted by U.S. police agencies as being a useful force tool, safer than many other weapons . . . . In practice, however, they are commonly used to subdue individuals who do not pose a serious and immediate threat to the lives or safety of others").

19. *See TASERs—Potentially Lethal and Easy to Abuse*, AMNESTY INT'L, Dec. 16, 2008, http://www.amnesty.org/en/news-and-updates/report/tasers-potentially-lethal-and-easy-abuse-20081216 (detailing statistics from Amnesty International study which found that of ninety-eight autopsies done, "90 per cent of those who died after being struck with a Taser were unarmed and many did not appear to present a serious threat").

violation of international law and had a "proven risk of harm or death."[20] In response, TASER International points out that a medical study from October 2007 concluded that 99.7% of 962 subjects had no injuries or only mild injuries after being shocked with a TASER, and insists that TASERs are safer than the alternative—lethal force.[21]

While there is lively debate about the appropriateness and proportionality of law enforcement's use of TASERs to apprehend suspects, the lower courts have struggled, without much guidance, to strike a balance between the needs of law enforcement and the rights of the individual.[22] Most of the claims that arise involving the use of TASERs by law enforcement officers are brought by victims as excessive force claims.[23]

In 1989, the United States Supreme Court held that when law enforcement uses excessive force to effectuate an investigatory stop, arrest, or other seizure of the person, such claims are "properly analyzed under

20. *See U.N.: Tasers Are a Form of Torture*, CBS NEWS, Nov. 25, 2007, http://www.cbsnews.com/stories/2007/11/25/national/main3537803.shtml (reporting that after six TASER-related deaths in one week people rallied demanding stun guns be banned). Again in May 2010, the United Nations reiterated its concern over the use of stun guns specifically when used to restrain persons already in custody which it concluded is a violation of the Convention Against Torture. *See* Press Release, Comm. Against Torture, Comm. Against Torture Concludes Forty-Fourth Session, U.N. Doc. CAT10/021E (May 14, 2010), *available at* http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/539D76CD77AEE766C125772300342DBB?OpenDocument (analyzing different TASER policies of international community that violate Convention Against Torture).

21. *See* Matthew J. Spriggs, Note, *"Don't Tase Me Bro!": An Argument for Clear and Effective Taser Regulation*, 70 OHIO ST. L.J. 487, 493 (2009) (implying that officers would have resorted to firearms in many situations where TASERs have instead been used). *But see* ACLU REPORT, *supra* note 14, at 6 (arguing that while TASER International continues to push TASERs as safer alternative to lethal force, they are most often used in situations in which "officers would never—and could never—use a gun").

22. *See* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U.L. REV. 1119, 1139 (2008) (recognizing marked confusion among lower courts in wake of last Supreme Court case to discuss excessive force claims and standards, *Scott v. Harris*, 550 U.S. 372 (2007)). This marked confusion is attributable to the Court's failure to determine which of the *Graham* factors is most significant and how courts should guide their analysis, further muddling the excessive force framework. *See id.* (concluding that Court further obscured reasonableness test for excessive force).

23. *See* Jeff Fabian, Note, *Don't Tase Me Bro!: A Comprehensive Analysis of the Laws Governing Taser Use by Law Enforcement*, 62 FLA. L. REV. 763, 768 (2010) (declaring that law governing officers' use of force is vague, which "allows courts to grant law enforcement officers a great deal of latitude when deciding how much and what type of force to use"). Despite this lack of specificity, courts have generally determined force to be excessive when it was "unreasonable or unnecessary . . . under the circumstances." BLACK'S LAW DICTIONARY 294 (3d pocket ed. 2006). Reasonable force is that force which is "necessary to achieve a legal goal," whereas excessive force is force "disproportionate to what is necessary to achieve a legal goal." *See* Charlie Mesloh et al., *Conducted Electrical Weapons and Resolution of Use-of-Force Encounters*, *in* TASER CONDUCTED ELECTRICAL WEAPONS, *supra* note 17, at 23, 24 (differentiating between excessive force and reasonable force).

the Fourth Amendment's 'objective reasonableness' standard."[24] While victims of excessive force are often successful in winning settlements, plaintiffs still face a major hurdle when bringing such claims, as officers often assert a qualified immunity defense.[25] Plaintiffs that can overcome a qualified immunity defense face yet another major obstacle: the objective reasonableness test of the Fourth Amendment, which considers the officers' point of view, and not their subjective intent, to decide whether their use of the TASER was reasonable.[26] Although TASERs have been around since the 1970s, they have surged in popularity over the last ten years with over 5,000 law enforcement agencies employing the TASER, but most without individual TASER policies to guide officers in the field.[27]

24. *See* Graham v. Connor, 490 U.S. 386, 388 (1989) (ruling that claims brought under § 1983 are meant to be addressed under specific constitutional guarantee, such as Fourth Amendment guarantee to be free from unreasonable searches and seizures, rather than single generic standard, and ruling that § 1983 was not meant to be "source of substantive rights" as guaranteed under Fourteenth Amendment).

25. *See, e.g.*, Amnesty Int'l, *supra* note 5, at 29-35 (reporting $675,000 settlement paid by City of Chula Vista, California after officer shot pregnant woman in her back causing her to fall belly-first onto concrete, causing fetal demise twelve hours later). A $145,000 settlement was paid by the City of Portland, Oregon to a seventy-one-year-old blind and deaf woman who was TASERed by officers three times—including once in the head, which caused her prosthetic eye to become dislodged from its socket—all because she failed to follow orders not to enter a trailer where her things were being kept. *See id.* (pointing out that Portland Police Department altered its policies shortly after this incident, "imposing restrictions on use of the Taser in the case of vulnerable people such as the elderly, children and pregnant women"). For a discussion of why defendants are often reluctant to settle, see *infra* notes 52-64 and accompanying text.

26. *See* Fabian, *supra* note 23, at 771 (discussing uncertainty of reasonableness inquiry, where officers can violate individual's Fourth Amendment rights by using excessive force and nonetheless be "immune from suit if the officers made a reasonable mistake as to what the law requires"). For a further discussion on the difficulty a plaintiff faces in bringing an excessive force claim due to the qualified immunity defense, see *infra* notes 52-64 and accompanying text.

27. *See* Amnesty Int'l, *supra* note 5, at 1 (arguing that use of TASERs should be put on hold until independent study properly addresses health and safety concerns). There have been a growing number of fatalities related to TASER usage in recent years, specifically when used against "people who are agitated or under the influence of drugs, or have underlying health problems." *See id.* (urging that independent studies are necessary to understand true medical risks of TASER devices because doctors are often hesitant to make conclusions about TASER-related fatalities as little is known medically about their effects). In April 2005, the International Association of Chiefs of Police issued a report on TASER technology urging police departments to reconsider their TASER policies and indicating that "independent data does not yet exist concerning in-custody deaths, the safety of [Electro-Muscular Disruption Technology] when applied to drug or alcohol-comprised individuals, or other critical issues." *See* INT'L ASS'N OF CHIEFS OF POLICE, ELECTRO-MUSCULAR DISRUPTION TECHNOLOGY: A NINE-STEP STRATEGY FOR EFFECTIVE DEPLOYMENT 5 (2005) [hereinafter IACP REPORT], *available at* http://www.theiacp.org/LinkClick.aspx?fileticket=JK7o%2b4Ai2hE%3d&tabid=87 (highlighting void in independent TASER data and addressing health implications of using TASER on body).

The lack of clear guidance by law enforcement agencies coupled with the limited guidance of states has led to vastly inconsistent results across the different circuits.[28]

This Note discusses the current state of TASER usage by law enforcement, specifically the lack of uniform guidelines to instruct officers when TASER use is appropriate, and it makes recommendations for clarity and reform.[29] Part II of this Note explains the difficulty that victims of TASER abuse face in bringing excessive force claims and the role of qualified immunity.[30] Part III addresses the challenges arising from the multi-factor balancing test set out by the Supreme Court.[31] Further, it highlights the untapped potential of state regulation to fill the void in TASER regulation.[32] Part IV details the use-of-force continuum relied upon by law enforcement agencies in deciding when a particular use of force is warranted, and compares United States TASER policies with international standards.[33] Lastly, Part V recommends stricter regulations that would still allow officers to use TASERs, but would provide a clear and consistent policy for deciding when such use is appropriate.[34]

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28. *See* Spriggs, *supra* note 21, at 497 (indicating that "only a few states have laws that specifically cover law enforcements use of tasers" and those that do only require a limited amount of TASER training before they are issued to officers). The United States Government Accountability Office conducted a study from late 2004 through mid-2005 of seven law enforcement agencies that had "purchased and used the largest number of Tasers for the longest period of time" and found that none of seven agencies had specific use-of-force policies for TASERs governing when such usage is appropriate. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. GAO-05-464, TASER WEAPONS: USE OF TASERS BY SELECTED ENFORCEMENT AGENCIES 2, 11-12 (2005) [hereinafter GAO REPORT], *available at* http://www.gao.gov/new.items/d05464.pdf (observing and reporting on TASER protocols in several law enforcement agencies and concluding that "as the Taser becomes more widely available for use . . . training is critical to help ensure its safe, effective and appropriate use"). Moreover, each agency required on average only four to eight hours of TASER training as compared to sixty to one hundred hours required for firearms. *See id.* at 11-12.

29. For a list of proposed recommendations to alleviate the confusion in current TASER regulation, see *infra* notes 170-97 and accompanying text.

30. For a discussion of excessive force claims and an analysis of the qualified immunity defense arguing that excessive force claims often fail because of wide discretion granted to officers in their use of force, see *infra* notes 35-64 and accompanying text.

31. For a discussion of the Supreme Court's multi-factor balancing test for excessive force and the struggle of lower courts and officers in applying this test, see *infra* notes 68-116 and accompanying text.

32. For a detailed discussion on the current lack of state law to guide law enforcement policies and the need for states to take a look at their current or nonexistent TASER policies and adopt specific regulations, see *infra* notes 117-26 and accompanying text.

33. For an analysis of the pros and cons of the use-of-force continuum, which guides many law enforcement agencies' use-of-force policies, as well as a discussion of international TASER policies, see *infra* notes 130-69 and accompanying text.

34. For a synopsis of regulations and recommendations that various sources have promoted for TASER usage, see *infra* notes 170-97 and accompanying text.

II. REASONABLE OR EXCESSIVE FORCE? TOEING THE FOURTH AMENDMENT LINE

A. *Fourth Amendment Excessive Force Claims*

Most often, excessive force claims arise as federal civil suits under 42 U.S.C. § 1983.[35] Section 1983 "gives a cause of action to someone who has been deprived of his or her constitutional rights by someone acting under the color of law."[36] For example, when an officer pulls over a car for speeding, he has, for the purposes of the Fourth Amendment, effectively seized the car and all of its passengers.[37] Thereafter, any force used by the officer in effectuating the stop can become subject to civil penalty under Section 1983 if the suspect can prove that the officer employed more force than necessary in making the stop.[38]

While excessive force claims can arise anytime an officer or government official uses more force than is necessary to effectuate a seizure, this Note will focus specifically on investigatory stops, arrests, and similar seizures that occur prior to an individual being formally indicted and charged with a crime.[39] These claims are properly analyzed under the Fourth Amendment.[40] Claims brought by incarcerated individuals are analyzed separately under the Eighth Amendment ban against "cruel and

35. *See* Fabian, *supra* note 23, at 768 (specifying normal procedure for excessive force claims).

36. *See id.* (denoting purpose of § 1983 to provide civil remedy where, specifically in relation to TASERs, individuals can bring claims for excessive force which deprived them of their constitutional right to be free from unreasonable restraint). Section 1983 provides in relevant part that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2006).

37. *See* Brendlin v. California, 551 U.S. 249, 251 (2007) (holding that passengers as well as drivers are "seized" for duration of traffic stop under Fourth Amendment).

38. *See, e.g.*, Bryan v. MacPherson, 608 F.3d 614, 623-24 (9th Cir. 2010) (alleging excessive force when suspect was pulled over for speeding and shot with TASER without warning, when suspect was neither threatening officer nor even facing him at time TASER was used).

39. *See* Lawrence J. Brennan, *A Simulation of Direct and Cross-Examination of an Expert Witness in an Excessive Force Case Followed by a Discussion Analyzing Its Legal and Strategic Aspects*, 512 PLI/LIT 153, 170 (1995) (indicating that when excessive force claims arise in context of investigatory stop, arrest, or similar seizure, they are most properly characterized as "invoking the protections of the Fourth Amendment, which guarantees the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person").

40. *See* Graham v. Connor, 490 U.S. 386, 388 (1989) (ruling that when suspect brings claim for excessive force in course of investigatory stop, arrest, or similar seizure, "such claims are properly analyzed under the Fourth Amendment").

unusual punishment."[41] While these claims are equally serious, this Note seeks to offer recommendations that will guide officers in the field and limit the number of excessive force claims.[42]

To succeed in an excessive force claim under the Fourth Amendment, a "plaintiff must demonstrate that (1) he suffered a significant injury; (2) resulting directly and only from the use of force that was clearly excessive to the need; and (3) the force used was objectively unreasonable."[43] While the Supreme Court has never specifically addressed how and when TASER usage may be deemed excessive force, it has elaborated on excessive force in several other contexts.[44] In *Tennessee v. Garner*,[45] the Court held that using deadly force against a fleeing felon who is unarmed and does not pose a significant threat of death or serious injury to an officer or others is excessive force under the Fourth Amendment.[46] The amount of force used by a suspect or the threat the suspect posed to officers were the most significant factors in the Court's analysis when deciding whether an officer's corresponding show of force was proportional or excessive.[47]

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41. *See* J. Michael McGuinness, *A Primer on North Carolina and Federal Use of Force Law: Trends in Fourth Amendment Doctrine, Qualified Immunity, and State Law Issues*, 31 CAMPBELL L. REV. 431, 446 (2009) (providing that "where excessive force is used against a convicted prisoner, the claim is analyzed under the Eighth Amendment to determine whether cruel and unusual punishment has been applied"); *see also* Fabian, *supra* note 23, at 768 (explaining that "the particular constitutional provision enforced depends on the context in which the alleged excessive force occurred").

42. For a list of recommendations for proper TASER usage that could be implemented to guide officers in the field and limit excessive force claims, see *infra* notes 170-97 and accompanying text.

43. *See* Autin v. City of Baytown, 174 F. App'x 183, 185 (5th Cir. 2005) (citing Fontenot v. Cormier, 56 F.3d 669, 675 (5th Cir. 1995)) (establishing three-prong test for plaintiffs to meet their burden for establishing excessive force claim under Fourth Amendment and emphasizing that officers' point of view is to be considered when evaluating reasonableness of their actions). The Court has made clear that "'not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." *See Graham*, 490 U.S. at 396 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)) (defining line between actionable and non-actionable conduct under Fourth Amendment).

44. For a discussion of Supreme Court precedent on the subject of excessive force under the Fourth Amendment, see *infra* notes 45-51 and accompanying text.

45. 471 U.S. 1 (1985).

46. *See id.* at 11-12 (failing to specifically state whether all excessive force claims arising from apprehension of suspect were to be analyzed under Fourth Amendment).

47. *See* Fabian, *supra* note 23, at 773 (noting that Supreme Court emphasized "non-dangerous nature of the suspect" and hinted that showing of deadly force may have been justified in *Garner* had suspect made threat of force to officers or "committed a crime with the potential to inflict serious harm"). Other factors that were considered by the Court in determining whether the suspect posed a threat included: the "suspect's age and physical characteristics; the severity of the underlying crime; and whether the suspect was armed." *Id.*

Four years later, in *Graham v. Connor*,[48] the Court addressed another excessive force claim and adopted much of its analysis in *Garner*, laying out a three-part test to guide lower courts when deciding whether a particular use of force was excessive.[49] The Court noted that the Fourth Amendment requires a case-by-case analysis, taking into consideration: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight."[50] While this framework to establish a claim for excessive force may seem rather straightforward, plaintiffs must often first overcome the qualified immunity defense in order to have their cases decided on the merits.[51]

B. *How Qualified Is "Qualified Immunity"?*

The Supreme Court has consistently recognized that government actors are entitled to some form of immunity from civil suits for damages.[52] The policy rationale behind the qualified immunity defense is that "public officers require this protection to shield them from undue interference

48. 490 U.S. 386 (1989).

49. *See id.* at 397 (making clear that pre-arrest claims of excessive force are to be analyzed under Fourth Amendment from prospective of reasonable officer on scene, affirming its reasoning in *Tennessee v. Garner*, 471 U.S. 1 (1985)). While the *Graham* test provides a "general standard for the efficacy of police behavior," one scholar has posited that it continues to "fail to provide specific criteria that officers may use when deciding whether and how much force should be applied." *See* Mesloh et al., *supra* note 23, at 25-26 (denouncing *Graham* test for lack of clarity and guidance to officers and courts).

50. *See Graham*, 490 U.S. at 396 (emphasizing that test for excessive force is "reasonableness" and courts must consider "totality of the circumstances" in addition to factors determined significant by Court). Circuit courts have reasoned that the Supreme Court did not intend to limit the reasonableness inquiry to these three factors. *See* Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005) (insisting that "'[b]ecause the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' the reasonableness of a seizure must instead be assessed by carefully considering the objective facts and circumstances that confronted the arresting officer" (quoting *Graham*, 490 U.S. at 396)). For a discussion of other factors lower courts have found to be determinative in their reasonableness analysis, see *infra* note 113 and accompanying text.

51. *See generally* Fabian, *supra* note 23, at 770-71 (explaining challenges faced by plaintiffs bringing excessive force claims). For a more detailed analysis of the difficulty of overcoming a qualified immunity defense, see *infra* notes 52-64 and accompanying text.

52. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (reasoning that if public officials feared lawsuits every time they made discretionary decisions they may hesitate to act when we need them to and some individuals may be deterred from taking up public service). One scholar has noted, however, that the fear of lawsuit does not "appear to wield the extraordinary power imagined by the court" in its justification for qualified immunity. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decision Making*, 57 UCLA L. REV. 1023, 1078 (2010) (insisting that lawsuits against law enforcement have generally carried no financial or workplace ramifications, and courts' fear that by holding them accountable for discretionary decisions will cause them to hesitate to act is overstated and overemphasized).

with their duties."[53] The qualified immunity defense, however, severely limits plaintiffs' opportunity to have their claims decided on the merits because the defense is exceptionally difficult to overcome.[54] As discussed below, the lack of clear regulations on TASERs and the nature of the qualified immunity inquiry result in such deference that courts will often find in favor of an officer's use of force even where its necessity is questionable.[55]

First, the test for qualified immunity laid out by the Court requires a two-part inquiry: "(1) whether a constitutional right would have been violated on the facts alleged; and (2) whether the right was clearly established."[56] Because the case law and regulations governing TASER use are vague or non-existent, courts are often hesitant to find that the right was clearly established and that a reasonable officer should have known his conduct was unconstitutional.[57]

Second, even if a court determines that a constitutional right was violated this does not mean a plaintiff will win the case on the merits.[58] Qual-

53. *See Harlow*, 457 U.S. at 807 (discussing two types of immunity from suit—qualified and absolute—and noting that most executive officials are entitled to only qualified immunity depending on complexity of decision-making).

54. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 846 (2010) (debating propriety of qualified immunity, which courts have embraced as "a necessary means of protecting government officials from abusive litigation" but which critics "argue . . . prevents valid claims from being adjudicated on the merits").

55. For a discussion of qualified immunity and the lenience granted to officers in the field, see *supra* notes 52-64 and accompanying text.

56. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (granting courts discretion to decide which prong should be addressed first given particular circumstances at hand, and overturning requirement that two-part test be decided in order as required by *Saucier v. Katz*, 533 U.S. 194, 200 (2001)).

57. *See, e.g.*, Bryan v. MacPherson, 608 F.3d. 614, 629 (9th Cir. 2010) (finding that while Bryan's constitutional rights were violated when officer used his TASER in dart mode when Bryan was neither resisting arrest nor attempting to flee, officer was nonetheless granted qualified immunity because court found there was no Supreme Court nor Ninth Circuit case law that clearly established that officer's conduct was outside bounds of Fourth Amendment); Chaney v. City of Orlando, 291 F. App'x 238, 244 (11th Cir. 2008) (finding there was no clearly established law that officer's pulling suspect out of his car, throwing him down on pavement, handcuffing him, using his TASER on suspect's back, and putting his foot on suspect's head "was so obviously wrong that [the officer] would have known it was unlawful"); Russo v. City of Cincinnati, 953 F.2d 1036, 1044 (6th Cir. 1992) (holding that while "plaintiffs' allegations may raise a genuine issue of material fact as to whether the use of the Taser was reasonable, plaintiffs have failed to show that clearly established law at the time of the incident declared such actions unconstitutional" or that reasonable officer would have known his conduct violated constitutional law).

58. *See* Mitchell v. Forsyth, 472 U.S. 511, 528-29 (1985) (insisting that questions of qualified immunity are distinct from merits of plaintiff's claim that his rights have been violated even though plaintiff's factual allegations may be considered in granting or denying qualified immunity). If a court determines that a government official violated a plaintiff's rights then qualified immunity may not be granted, but a "final determination on the merits of whether the plaintiff's rights

ified immunity, which attempts to alleviate a public official from the burdens of trial, is "immunity from suit rather than a mere defense to liability."[59] For this reason, qualified immunity is normally asserted in a motion for summary judgment whereby the reviewing court must view the facts in the light most favorable to the plaintiff.[60] Thus, a court's ruling that a constitutional violation has occurred is not a final determination by the fact finder; at trial, defendants can still win if plaintiffs fail to prove their version of the facts.[61]

Lastly, even if a district court denies a request for qualified immunity, the decision is immediately appealable.[62] The government will almost always appeal a denial of qualified immunity, making it commonplace for appellate courts to ultimately determine that issue.[63] These mechanisms are designed to give officers plenty of opportunity to assert a strong quali-

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were violated would still be left to the fact finder." *See* Fabian, *supra* note 23, at 770 (explaining that not only must plaintiffs overcome qualified immunity hurdle but even if they succeed they must still sufficiently prove their claim at trial in order to win their claim overall).

59. *See* Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) (stating Court's belief that "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"—are sufficient reasons for qualified immunity).

60. *See* Fabian, *supra* note 23, at 771 (discussing rationale behind asserting qualified immunity in motion for summary judgment to attempt to avoid going to trial at all on plaintiff's claims and not having to be subjected to rigors of trial process).

61. *See Mitchell*, 472 U.S. at 528 (indicating court's policy preference that public officials be given every benefit of doubt to refute claims made in reference to their discretionary decisions, emphasizing significant costs if such claims were easily litigated by plaintiffs).

62. *See id.* at 526-27 (holding that claim of qualified immunity satisfies two-prong test for being immediately appealable, because it (1) conclusively determines disputed question and (2) involves "[claim] of right separable from, and collateral to, rights asserted in the action"). The Court found significant that once a claim for qualified immunity is denied, the defendant has no other option but to proceed on with a trial that may be costly and still ultimately result in defendant's favor. *See id.* at 527 (requiring defendant–officers to have another mechanism at their disposal to ensure they are not required to go to trial on erroneous excessive force claims).

63. *See* Fabian, *supra* note 23, at 770 ("[D]istrict court's order denying qualified immunity is immediately appealable. Thus, it is common for an appeals court to decide questions of qualified immunity."). For example, each circuit case mentioned in this Note is an appeal from a grant or denial of qualified immunity on a motion for summary judgment. *See, e.g.*, Cook v. City of Bella Villa, 582 F.3d 840, 844 (8th Cir. 2009) (noting procedural challenge by plaintiff of district court's grant of summary judgment to defendant on Fourth Amendment excessive force claims); Autin v. City of Baytown, 174 F. App'x 183, 183 (5th Cir. 2005) (noting procedural challenge by defendant of district court's denial of summary judgment for excessive force claim).

fied immunity defense, severely limiting a plaintiff's opportunity to have his or her day in court.[64]

III. LACK OF GUIDANCE: COURTS AND LAW ENFORCEMENT ATTEMPTING TO STRIKE A BALANCE

As it stands, the Supreme Court has never specifically addressed TASERs, leading the lower courts to rely on the test laid out in *Graham v. Connor* when deciding whether use of a TASER was excessive.[65] Part III.A will detail the vastly inconsistent results arising from the lower courts' application of *Graham*, and Part III.B will discuss the difficulty officers have applying the multi-factor *Graham* test in the field.[66] Lastly, Part III.C will encourage state regulation of TASERs as an effective route to eliminate some of the inconsistencies caused by *Graham*—at least at the state level—by creating uniformity across state law enforcement agencies.[67]

A. *Applying Supreme Court Precedent*

While lower courts have consistently decided that the *Graham* test should be applied to TASER cases, the results of their applications have been inconsistent.[68] Because the *Graham* test involves balancing a multitude of factors in each case, it has failed to provide courts with a "systematic conceptual framework for assessing police uses of force," leaving lower courts to emphasize different factors depending on the circumstances.[69] The analysis of the *Graham* factors below will highlight the inconsistent results that have arisen as lower courts continue to rely on *Graham* to assess excessive force claims.[70]

64. *See* Fabian, *supra* note 23, at 772 (indicating strong argument for courts to decide qualified immunity test sequentially by first deciding whether officer has violated Constitution because then plaintiffs will have their day in court).

65. *See id.* at 774 (pointing out that while lower courts have largely embraced *Graham* test, many scholars are markedly dissatisfied with it). One scholar's dissatisfaction arises from the lack of clear guidance it provides for both courts and law enforcement. *See* Harmon, *supra* note 22, at 1129-30 (arguing that *Graham* fails to guide courts on which government interests justify force and where those interests should be placed in reference to different levels of force available).

66. For a discussion of the *Graham* test application by courts and officers, see *infra* notes 68-116 and accompanying text.

67. For a discussion of current state TASER regulations, see *infra* notes 117-26 and accompanying text.

68. For a discussion addressing the inconsistencies across the lower courts in their application of *Graham* to excessive force situations, see *infra* notes 69-92 and accompanying text.

69. *See* Harmon, *supra* note 22, at 1127-30 (criticizing *Graham* test for failing to answer most basic questions about use of force by police: "when a police officer may use force against a citizen, how much force he may use, and what kinds of force are permissible"). For a discussion on other key factors lower courts have found persuasive in excessive force cases, see *infra* note 113 and accompanying text.

70. For a discussion of the application of *Graham* by lower courts, see *infra* notes 68-92 and accompanying text.

1. *Severity of the Underlying Crime at Issue*

In many cases, the underlying crime at issue may be entirely irrelevant in determining the reasonableness of the use of force applied in the situation.[71] While the underlying crime may be minimal, the perceived threat to the officer on the scene may be high.[72] For example, where an officer has pulled over a car for speeding but is outnumbered, at night, with actively resisting individuals, the threat may be quite high even though speeding is a minor offense.[73] Vice versa, while the underlying crime may be more severe, the threat to the officer may be minimal.[74] This is the case, for example, where the officer has already restrained the individual.[75] For these reasons, lower courts have often referenced the underlying crime but have rarely found it determinative.[76]

71. *See* Harmon, *supra* note 22, at 1130 (arguing that *Graham* "requires courts to consider the severity of the underlying crime in all cases," which is "sometimes irrelevant and misleading in determining whether force is reasonable"); *see, e.g.*, Buckley v. Haddock, 292 F. App'x 791, 792-95 (11th Cir. 2008) (holding that underlying crime of speeding was irrelevant to determining whether use of force was required when suspect allegedly became belligerent behind vehicle—posing threat to safety of other drivers and himself by being so close to road).

72. *See, e.g.*, Cook v. City of Bella Villa, 582 F.3d 840, 849 (8th Cir. 2009) (underlying offense of failure to maintain single lane and driving under influence, while minimal, did not preclude court from finding that use of TASER was reasonable where officer was "alone and outnumbered by presumably intoxicated suspects," three of whom were actively resisting officer's attempts to control situation).

73. *See id.* (highlighting how underlying offense can be immaterial to actual or perceived threat by officer on scene).

74. *See, e.g.*, Campos v. City of Glendale, No. 06-610, 2007 WL 4468722, at *3 (D. Ariz. Dec. 14, 2007) (noting that even though underlying offense of unlawful gunfire "warranted extreme caution on the part of the officers," suspect was passed out, lying face down on his bed, surrounded by officers, partially handcuffed, and only passively resisting arrest by failing to respond to orders).

75. *See id.* (finding officers' use of force reasonable because underlying offense warranted extreme caution, despite fact that situation was clearly under control and suspect was passed out and surrounded by officers).

76. *See, e.g.*, Scott v. Harris, 550 U.S. 372, 376 (2007) (noting that both district court and appellate court had determined use of force to be unreasonable since underlying offense was only speeding—which was reversed by Supreme Court). The Court never specifically stated that the underlying crime was irrelevant, but instead relied on the threat posed to the officer and others and the culpability of the suspect. *See id.* at 383-84 (refusing to find underlying crime determinative). Since *Scott v. Harris*, one scholar has argued that the Court has further muddled the *Graham* factors to be considered in excessive force claims by "deemphasiz[ing], if not eliminat[ing], any significant instruction to lower courts facing future cases about what to consider in evaluating police violence[ ] and remain[ing] near silent about how to balance the interests of officers, suspects and others." *See* Harmon, *supra* note 22, at 1139 (voicing disapproval of Court's reasoning in *Scott v. Harris*, which continues to confuse rather than guide excessive force inquiries).

2. *Whether the Suspect Poses an Immediate Threat to Officers or Others*

The threat a suspect poses to officers or others is largely defined by a reasonable officer's perception of the scene.[77] Courts have often granted deference to officers under this factor, condoning an officer's use of force even where it is questionable if the suspect actually posed an immediate threat to the officer or others.[78] In *Buckley v. Haddock*,[79] the police pulled over a homeless man for speeding, whereafter the man became distraught over receiving a ticket, which he refused to sign.[80] After being placed under arrest and walked to the police vehicle, Buckley dropped to the ground and began to sob hysterically.[81] When he refused to get up he was TASERed three times.[82] The court upheld the TASERing as reasonable

77. *See* McGuinness, *supra* note 41, at 484-85 (stating relevant inquiry in excessive force claims is based on objective reasonableness standard where "question is whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force"). The Court has made clear that when reviewing actions of an officer on the scene they "may not employ 'the 20/20 vision of hindsight' and must make 'allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.'" *See id.* at 486 (quoting Graham v. Connor, 490 U.S. 386 (1989)) (directing courts' focus to "the circumstances at the moment the force was used" and giving officers benefit of doubt where reflection is not possible prior to acting).

78. *See, e.g.*, Edwards v. City of Martins Ferry, 554 F. Supp. 2d 797 (S.D. Ohio 2008) (holding that use of TASER on eighty-two-year-old man, guilty of urinating in public, was reasonable because officer could not just let man walk away and ignore complaint that he had urinated in public simply because he was advanced in age and had deteriorated mental state); Johnson v. City of Lincoln Park, 434 F. Supp. 2d 467 (E.D. Mich. 2006) (finding use of TASER on fourteen-year-old ninth grader reasonable under Fourth Amendment where he was actively resisting arrest despite being handcuffed and surrounded by four officers); Nico Hines, *Andrew Meyer, the Student Who Begged: 'Don't Tase Me Bro!', Becomes Internet Star*, TIMES ONLINE (London), Sept. 19, 2007, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article2489183.ece (reporting that while Andrew Meyer refused to leave John Kerry event quietly, John Kerry remarked that he could have dealt with Meyer himself and answered his questions without need for TASERing of student).

79. 292 F. App'x 791 (11th Cir. 2008).

80. *See id.* at 792 (noting that signing of traffic citation is required by law and officer warned plaintiff twice that he would be arrested if he failed to sign).

81. *See id.* (indicating that plaintiff did not resist being handcuffed, voluntarily got out of his vehicle, and his only resistance consisted of his dropping to ground, hysterically crying, and stating "my life would be better if I was dead").

82. *See id.* (emphasizing that officer first attempted to lift plaintiff to his feet and then gave both warning and time for plaintiff to comply with warning each time before TASERing suspect). Whether an officer warned the suspect before discharging his TASER is often a factor weighed in a court's excessive force balance. *See, e.g.*, Bryan v. MacPherson, 608 F.3d. 614, 627 (9th Cir. 2010) (finding that force was unreasonable, underscoring that officer failed to give warning before using TASER on suspect). The court reasoned that "police officers normally provide such warnings where feasible, even when the force is less than deadly, and that the failure to give such a warning is a factor to consider." *Id.*

on the theory that Buckley posed a threat to other drivers, the officer, and himself because the incident occurred close to the side of the road.[83]

One scholar questioned whether Buckley actually posed any threat, as it was late at night, the officer and the suspect maintained a safe distance from the highway at all times, and they were in an area the officer himself described as "desolate."[84] While Buckley may have been uncooperative, one can seriously doubt that he was a threat to the officer or that the officer perceived him as a threat.[85] The officer made several trips to the police cruiser to report the status of the situation, leaving Buckley unattended for extended periods of time.[86] The officer would not have left Buckley unattended for such long absences if he felt threatened or feared that Buckley would flee.[87]

3. *Whether the Suspect Is Actively Resisting Arrest or Attempting to Evade Arrest by Flight*

Cases often hinge on this factor: if a suspect is actively resisting an officer's attempts to restrain him, the officer's use of force is granted wide

83. *See Buckley*, 292 F. App'x at 802 (Martin, J., dissenting) (disagreeing vehemently on this point, District Judge Martin points out that Buckley's only movement on ground was when TASER was applied to him, at which point he moved further away from road—not closer to it—and at no point in time were officer and suspect any closer to highway than they were when suspect was first pulled over on highway). Chief Judge Edmondson's holding that Buckley posed a threat to the officers and other drivers seems to be based on his flawed belief that Buckley "'could both kick and run' because his legs were not restrained and 'was moving around on the ground alongside a busy road.'" *See id.* at 799, 802 n.5 (citation omitted) (disputing majority's justification by pointing to video evidence). Judge Martin indicated that both the video and officer testimony refutes Chief Judge Edmondson's understanding. *See id.* at 799 (noting evidence that Buckley was in no condition to run and made no movement to do so even when left alone by officer as well as officer testimony that road was "'desolate'" and "'out in the middle of no where'" (footnotes omitted)).

84. *See* Fabian, *supra* note 23, at 783-84 (emphasizing those factors highlighted by dissent in *Buckley* and concluding officer's use of TASER in situation did not "serve the government's interest in effective law enforcement"). The officer's interest in that case was getting the plaintiff into the police cruiser, which could not be accomplished through the use of a TASER because it incapacitated the suspect, making him "temporarily unable to comply with an officer's demands." *See id.* (remarking that "successive Taser shocks may actually frustrate an officer's attempt to secure suspect compliance").

85. *See id.* at 784-85 (commenting that officer's "safer, non-violent alternative was to call for backup").

86. *See id.* at 784 (pointing out that court's analysis is questionable as to whether Buckley posed threat to anyone involved as officer described road as "'desolate'" and "'out in the middle of no where'" (footnotes omitted)). Moreover, TASERing Buckley did not serve the government's interest in effective law enforcement because it did not resolve the problem of getting Buckley into the police cruiser. *See id.* (criticizing court's holding).

87. *See id.* at 784-85 (questioning whether officer's use of TASER on Buckley was warranted).

discretion and generally upheld.[88] In *Edwards v. City of Martins Ferry*,[89] a district court upheld an officer's use of a TASER on an eighty-two year old man with Alzheimer's disease "because the man continued to struggle after the officer pinned him down on the hood of a police car."[90] Another court upheld the TASERing of a fourteen-year-old who was handcuffed and surrounded by four officers because he was violently resisting arrest by kicking, punching, and biting officers.[91] One scholar has pointed out that while these individuals were both vulnerable—one suffered from Alzheimer's disease and the other was a minor—and already restrained, active resistance was enough to outweigh these considerations.[92]

B. *What Does* Graham *Mean for Officers?*

While lower courts have consistently relied on *Graham* to guide their analyses, the *Graham* test has done little to guide officers in the field.[93] Indeed *Graham* has articulated several factors an officer must consider when deciding what level of force is appropriate, but it fails to provide a practical standard for officers to rely on in conducting their duties.[94] It is unlikely that an officer faced with a tense situation will have the time to perform a balancing test of multiple situational factors and make a well-founded conclusion when even courts have difficulty doing this without the added pressure of time and danger.[95]

The balancing test contains two sources of inherent uncertainty that make it difficult for officers in the field to evaluate the reasonableness of a certain use of force.[96] As one scholar has explained, "the first source of uncertainty stems from the fact-sensitive nature of the test: Reasonable in-

88. *See id.* at 788 ("[A]ctive resistance will almost always justify Tasering a suspect—even when the suspect is already restrained, poses a minimal threat, or when the suspect is from a vulnerable class of persons.").

89. 554 F. Supp. 2d 797 (S.D. Ohio 2008).

90. *See* Fabian, *supra* note 23, at 779 (illustrating that "active resistance by the arrestee weighs heavily in the officer's favor," often resulting in grant of qualified immunity to officer even where force was used on vulnerable individual).

91. *See id.* at 780 (pointing out *Edwards* court's view that active resistance by arrestee was reasonable justification for TASERing despite vulnerability of suspect).

92. *See id.* at 781 (concluding that "active resistance weighs heavily in the Fourth Amendment reasonableness analysis").

93. *See* Harmon, *supra* note 22, at 1129-30 (arguing that *Graham* gives officers in field "little instruction on how to weigh relevant factors").

94. *See* Fabian, *supra* note 23, at 774-75 ("Ideally, a test for evaluating the reasonableness of a particular use of force would provide officers guidance without having to wait for courts to decide whether a course of action is constitutional.").

95. *See id.* (pointing out impracticality of expecting officers in field facing danger and rapidly evolving situations to perform balancing test prior to resorting to course of action).

96. *See id.* at 775 (fleshing out uncertainties of balancing test and its inability to provide needed guidance to officers in field).

dividuals may interpret the same set of facts differently, leading to different conclusions about whether a particular use of force was reasonable."[97]

For example, in *Cook v. City of Bella Villa*,[98] an officer pulled over a vehicle for allegedly crossing over the double yellow line several times.[99] When the driver refused a sobriety test the officer allegedly slammed her against the hood of the car in an attempt to handcuff her, and in the process began touching her inappropriately.[100] Her husband, one of three passengers in the car, then got out and yelled at the officer who in turn replied: "I'll talk to you in a minute."[101] As the officer was attempting to move the woman towards his police cruiser, the husband stepped towards the officer, and in that instant the officer shot the husband with his TASER.[102]

In concluding that the officer's use of the TASER was reasonable, the majority emphasized that the officer was responding to a "rapidly escalating situation" when he used the TASER, because it was after midnight and he was outnumbered by three non-complying individuals when the husband came towards him.[103] The dissent, however, in applying the *Graham* factors, noted that while the husband's offense was resisting arrest, which can pose a serious risk to the officer, his behavior of yelling at the officer and refusing to get back in the car was at best insolence.[104] The dissent reasoned that because the command to get back in the car occurred simultaneously with the shooting of the TASER, "[the husband's] failure to comply cannot be deemed resistance."[105] Further, the officer told the husband he would be with him in a minute, and as the officer came towards him the husband merely took a step in the officer's direction.[106] The dissent insisted this was not a "dramatic threatening move" and there-

97. *See id.* (pointing to opposite conclusions drawn by majority and dissent in interpreting same set of facts in most recent excessive force case, *Scott v. Harris*, 550 U.S. 372, (2007)).

98. 582 F.3d 840 (8th Cir. 2009).

99. *See id.* at 845 (recounting officer testimony that vehicle had crossed over double yellow lines twice to justify pulling vehicle over).

100. *See id.* at 845-46 (noting that facts were in dispute as to suspect's resistance to sobriety tests and whether officer touched suspect inappropriately).

101. *See id.* at 846 (acknowledging resistance from three of four passengers as officers attempted to control situation).

102. *See id.* (indicating that TASERing occurred simultaneously with command to get back in car).

103. *See id.* at 851 (summarizing factors most significant to majority in its holding that force was reasonable).

104. *See id.* at 859 (Shepherd, J., dissenting) ("'A reasonable officer would not discharge his Taser simply because of insolence.'" (quoting Parker v. Gerrish, 574 F.3d 1, 10 (1st Cir. 2008))).

105. *See id.* (stressing suspect was not given time to comply before being TASERed).

106. *See id.* (submitting factors that weigh against classifying TASER use by officer as reasonable).

fore did not pose an immediate threat to the officer's safety.[107] Lastly, the dissent noted that there was nothing to "indicate that . . . [the husband] was actively resisting or attempting to flee."[108] This case, like many others, demonstrates how ambiguous the term "reasonableness" is in providing guidance, as two reasonable groups of individuals can draw equally reasonable and yet conflicting conclusions about the same set of facts.[109]

The second source of uncertainty comes from the Supreme Court's lack of guidance as to how to weigh the *Graham* factors against one another and the Court's failure to limit the factors that may be relevant to the balancing test.[110] In addition to the *Graham* factors, the majority and dissent in *Cook* highlighted the extent of the suspect's injury as a major factor in whether the officer's force was excessive.[111]

Some lower courts, including at least one U.S. court of appeals, have reasoned that because the Supreme Court said that the Fourth Amendment "is not capable of precise definition" it did not mean to limit the balancing test strictly to the three factors identified in *Graham*.[112] In addition to the *Graham* factors, courts have looked at: (1) whether the action takes place in the context of affecting an arrest; (2) the possibility that the suspect may be armed; (3) whether the officer gave a warning before using the TASER; (4) whether more than one arrestee or officer was involved; (5) whether the individual was restrained; (6) whether the officer applied repeated shockings; (7) whether a warrant was used; (8) whether the plaintiff was sober; and (9) whether other dangerous exigent circumstances existed at the time of the arrest.[113]

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107. *See id.* (internal quotation marks omitted) (disputing majority's claim that husband posed immediate threat to officer's safety).

108. *See id.* (finding in alternative that husband was generally compliant).

109. *See, e.g.*, Scott v. Harris, 550 U.S. 372, 375-92 (2007) (displaying marked disagreement between majority and dissent as to reasonableness of defendant-officer's actions in running plaintiff off road and disagreeing as to whether plaintiff in fact posed threat to officer or others based on video evidence).

110. *See* Fabian, *supra* note 23, at 775 (noting that "this leaves courts and law enforcement officers with little guidance about how to determine relevance of a particular fact or circumstance").

111. *See Cook*, 582 F.3d at 850-60 (noting significance of degree of injury in excessive force claims). For a discussion of the *Cook* court's analysis of the *Graham* factors and other factors highlighted by the majority and dissent, see *supra* notes 98-109 and accompanying text.

112. *See, e.g.*, Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005) (reasoning that Supreme Court did not intend to limit consideration of other factors in reasonableness assessment under Fourth Amendment).

113. *See* Autin v. City of Baytown, 174 F. App'x 183, 185 (5th Cir. 2005) (finding significant whether officer gave warning before using TASER, whether individual was restrained, and whether officer applied repeated shockings); Chew v. Gates, 27 F.3d 1432, 1441 n.5 (9th Cir. 1994) (including in its reasonableness analysis: "whether a warrant was used, whether the plaintiff resisted or was armed, whether more than one arrestee or officer was involved, whether the plaintiff was sober, whether other dangerous exigent circumstances existed at the time of the arrest and the nature of the arrest charges"); Shultz v. Carlisle Police Dep't, 706 F. Supp. 2d 613, 620 (M.D. Pa. 2010) (including in its reasonableness analysis:

Faced with these multi-factor balancing tests, with no one factor ever being dispositive, officers must "rely on a rigorous, fact-based analysis of existing case law to determine the constitutionality of a course of action," which is completely impractical in real world situations.[114] Officers also struggle to determine if their conduct is reasonable when faced with conditions in the field not previously addressed by the courts, or in situations where courts are split as to a specific course of action, because officers may have nothing to rely on to gauge their actions.[115] While state regulation would provide consistent guidance for officers, this type of regulation has been sparse.[116]

C. *State Regulation of TASERs: Untapped Resources*

Since the TASER is not classified as a firearm, there are currently no federal regulations or restrictions on ownership or usage.[117] This void in federal law leaves states free to regulate TASERs more restrictively while remaining within the bounds of the Fourth Amendment.[118] While state regulation would not necessarily create uniform standards across the nation, it would at least create uniformity across state law enforcement agencies.[119] New Jersey is currently the only state to ban TASER use by anyone,

"whether the action takes place in the context of affecting an arrest, the possibility that the suspect may be armed and the number of persons with whom the police officers may contend at one time" (citing Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir. 1997))).

114. *See* Fabian, *supra* note 23, at 775 (indicating difficulty faced by officers in applying this ambiguous test). For a discussion of the impracticality of expecting officers to apply a multi-factor balancing test prior to pursuing a course of action, see *supra* notes 93-116 and accompanying text.

115. *See* Fabian, *supra* note 23, at 775 (denouncing fact-specific test laid down by Supreme Court in *Graham* for its lack of guidance to officers in field and its ambiguity for courts to sort out).

116. For a discussion of the current state TASER regulations, see *infra* notes 117-26 and accompanying text.

117. For a discussion of why the TASER is not subject to federal restrictions, see *supra* note 14 and accompanying text.

118. *See* Fabian, *supra* note 23, at 793 (remarking that while gap in federal regulation would not create uniform standards, it would "allow the states to fulfill their classic roles as laboratories for democracy to determine what works and what does not"). "Laboratories of democracy" is the notion that states are in a unique position to enact policies to meet their goals, which are evaluated and then adopted by other states if the policy meets its prescribed goals. *See* ANDREW KARCH, DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES 5 (2007) (noting Justice Brandeis's metaphor of states as "laboratories for democracy" has been used with "great regularity" to describe unique process of trial and error in which states adopt policies to meet their needs, other states evaluate such policies, and then those states adopt them if they are successful or try something different if not).

119. *See* Fabian, *supra* note 23, at 793 (observing that federal judiciary could impart bright-line rules that would provide officers with specific guidance and create uniform national standard, but given Supreme Court's notion that "reasonableness under the Fourth Amendment is not capable of precise definition," it is not likely).

including law enforcement.[120] Florida and Georgia are the only two states to address TASER use by law enforcement.[121]

The Georgia statute is broad and simply states that a TASER be "used for law enforcement purposes in a manner consistent with established standards and with federal and state constitutional provisions."[122] The Florida statute is much more specific and states that in order to use a TASER, the circumstances

> [m]ust involve an arrest or a custodial situation during which the person who is the subject of the arrest or custody escalates resistance to the officer from passive physical resistance to active physical resistance and the person: (a) has the apparent ability to physically threaten the officer or others; or (b) is preparing or attempting to flee or escape.[123]

Essentially, Florida requires active resistance by the subject and either (a) the apparent ability to physically threaten an officer or others or (b) an attempt to flee.[124] The Florida statute is helpful in two ways: it "ensures proportionality between the suspect's actions and the officer's use of force" and it is "within the bounds of what is considered reasonable under the Fourth Amendment."[125] Explicit state regulations, similar to the one adopted in Florida, would resolve many of the inconsistencies in current case law and provide a uniform standard for state law enforcement agen-

120. *See* N.J. STAT. ANN. § 2C:39-3(h) (West 2009) ("Any person who knowingly has in his possession any stun gun is guilty of a crime of the fourth degree."). Nonetheless, the statute does allow for the Attorney General to designate certain limited officers who can carry stun gun devices and those designated are exempt from the stun gun section of the provision. *See id.* § 2C:39-3(g) (providing for specific, limited exceptions to statute).

121. *See* FLA. STAT. § 943.1717(1)(a)-(b) (2006) (providing specific guidelines for TASER usage by law enforcement); GA. CODE ANN., § 35-8-26 (2009) (providing broad "electronic control weapons" policy for law enforcement to abide by).

122. GA. CODE ANN., § 35-8-26. Georgia has essentially adopted the federal standard for use-of-force. *See* Fabian, *supra* note 23, at 791 (evaluating specific state policies enacted to regulate TASERs).

123. FLA. STAT. § 943.1717(1)(a)-(b). "This statute clearly defines the scenario in which law enforcement may legally deploy stun gun technology." Spriggs, *supra* note 21, at 497 (implying that other states would be better off if they adopted policies similar to Florida's, which denotes specific regulations for TASERs rather than grouping them in with other non-lethal weapons).

124. *See* Fabian, *supra* note 23, at 791 (indicating that statute is in line with most courts that are almost always willing to condone officer's use of TASER when suspect is actively resisting, while scenarios involving passive resistance are often where inconsistencies in case law arise).

125. *See id.* (noting that statute effectively places TASER on level three of use-of-force continuum, allowing usage only when suspect actively resists). For a further discussion of the use-of-force continuum and how it guides officers' use of force, see *infra* notes 130-53 and accompanying text.

cies to apply in the field without fear of repercussions due to the uncertainty of a particular course of action.[126]

IV. WHAT LEVEL OF FORCE IS APPROPRIATE?

Due to the lack of state and federal regulation, law enforcement agencies have taken it upon themselves to craft their own TASER policies.[127] Part IV.A will detail the use-of-force continuum and the role it plays in guiding officers in appropriate uses of force depending on situational factors.[128] Part IV.B will discuss international standards adopted by other countries.[129]

A. *Use-of-Force Continuum*

The use-of-force continuum is a structure used by many law enforcement agencies to establish a clearly defined set of rules to guide officers when encountering a suspect.[130] The structure is "based on the subject's actions, the officer's perception of the situation and the available types of officer responses."[131] The use-of-force continuum serves as a visual guide that "depicts progressive escalation and de-escalation of force based on a subject's actions" by correlating each action by a suspect to a proportional officer response.[132]

126. *See* Spriggs, *supra* note 21, at 518 (concluding that if regulations are incorporated into federal or state law, "law enforcement officers will be enabled to safely and effectively deploy tasers in appropriate situations without fear of lawsuits or disciplinary actions"). Leaving TASER regulation in its current state places both officers and civilians at risk. *See id.* (specifying that "only a taser regulation that recognizes the value of tasers but acknowledges their unique functionality will be effective").

127. *See id.* at 501 (reporting that law enforcement agencies have been forced to implement their own policies due to dearth of state and federal regulation).

128. For a discussion of the use-of-force continuum and its role in current law enforcement TASER policies, see *infra* notes 130-53 and accompanying text.

129. For a discussion of international TASER standards, see *infra* notes 154-69 and accompanying text.

130. *See* GAO REPORT, *supra* note 28, at 7 (noting that law enforcement agencies frequently refer to use-of-force models); *see also* Mesloh et al., *supra* note 23, at 24 ("Use of force can be defined as the 'exertion of power to compel or restrain the behavior of others,' or when used in the context of policing, 'acts that threaten or inflict physical harm on suspects.'" (citation omitted)).

131. *See* GAO REPORT, *supra* note 28, at 7 (defining purpose and utility of use-of-force policies).

132. *See* FED. LAW ENFORCEMENT TRAINING CTR., U.S. DEP'T OF HOMELAND SEC., *Use of Force Continuum (Podcast Transcript)* [hereinafter FLETC], *available at* http://www.fletc.gov/training/programs/legal-division/podcasts/hot-issues-podcasts/hot-issues-transcripts/use-of-force-continuum-podcast-transcript.html (last visited Feb. 20, 2011) (describing use-of-force continuums as "mainstay" in law enforcement practices for many years). One commentator has noted that use-of-force models are helpful because they legitimize, in the minds of civilians, who do not have "training, experience or knowledge to comprehend the realities of the street," an officer's particular use of force to see if it is consistent with an official policy. *See* Dave Grossi, *Setting the Record Straight on Force Continuums*, POLICE MARKS-

Nevertheless, the Federal Law Enforcement Training Center (FLETC)—the creator of the use-of-force continuum—has made clear that the continuum directly conflicts with Supreme Court precedent, which states that "reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."[133] The obvious drawbacks of a use-of-force model are its inability to account for (1) different circumstances, as no two encounters between an officer and a suspect are ever exactly the same, and (2) the spur-of-the-moment decisions officer's must often make.[134] While these are valid concerns, a use-of-force continuum is meant to provide officers with guidelines, not a rigid set of rules that must be followed in every situation.[135] Although the FLETC has done away with the use-of-force continuum, many law enforcement agencies still adhere to it, so it is important to understand what role it plays in current force regulations and specifically TASER regulation.[136]

Many use-of-force models are based on the FLETC use-of-force continuum.[137] The premise of the model is that "an officer should employ more forceful means to control a subject only if the officer determines that a lower level of force is inadequate."[138] For example, using the

MAN, Jan./Feb. 2006, *available at* http://www.policeone.com/pdfs/forcecont PMAjf2006.pdf (condoning use-of-force models, despite their abandonment by FLETC, emphasizing their ability to convey to civilians and particularly members of jury "reasonable progression of force" which can be applied to officers' use of force in particular situation).

133. *See generally* FLETC, *supra* note 132 (indicating that use-of-force continuums are attempting to do what Supreme Court has said is impossible to do by creating mechanical application of reasonableness under Fourth Amendment). Another problem with use-of-force models are the generic terms such as "passive resistance" or "active resistance" that are used, because there is no universal agreement as to how each of these terms should be defined. *See id.* (explaining that actions viewed as passive resistance by one officer may appear to be active resistance to another, which "may cause an officer to unnecessarily hesitate").

134. *See id.* (emphasizing that it is impossible for model to account for factors such as "known violent history of the suspect; duration of the action; size; age; condition of the officer and suspect; and other facts that may make up the totality of circumstances").

135. *See* GAO REPORT, *supra* note 28, at 7 (indicating that use-of-force policies provide *guidance* to officers, not rigid set of rules).

136. *See id.* at 9 (reporting that all seven agencies contacted for survey used some form of use-of-force policy). The International Association of Chiefs of Police developed a nine-step strategy designed to guide law enforcement in its use and implementation of TASERs and encouraging agencies to adopt similarly structured policies to guide their officers. *See* IACP REPORT, *supra* note 27, at 5 (stating belief that as more agencies continue to implement TASER technology "they can be aided by a structured process for decision-making and deployment").

137. *See* GAO REPORT, *supra* note 28, at 7-8 (noting that FLETC use-of-force continuum includes five levels of "potential subject actions and corresponding officer responses," with subject actions ranging from compliant to assaultive and officer responses ranging from cooperative controls to deadly force).

138. *See id.* at 8 (stating that officers are generally encouraged to employ "minimum amount of force necessary under the circumstances" when responding to suspect's actions).

FLETC's use-of-force continuum, if a suspect is compliant with an officer's orders, the officer should respond with "cooperative controls," such as verbal commands to control the suspect.[139] Likewise, if an officer perceives a suspect to be passively resisting, the model provides for "compliance techniques," which include techniques such as pressure points and joint locks.[140]

In a study conducted by the Government Accountability Office of seven law enforcement agencies that distributed and used TASERs in their daily practices, all seven reported that they trained their officers using some form of a use-of-force model.[141] Further, all of the agencies confirmed that "they rely on the continuum to help provide officers with guidance in carrying out their law enforcement responsibilities."[142] Nevertheless, none of the agencies had a separate use-of-force policy that specifically addressed TASERs.[143] Rather, each had incorporated the TASER into its existing use-of-force policy.[144] In addition to lacking specific TASER regulations, the policies varied based on where the TASER was placed on each agency's use-of-force continuum.[145] One law enforcement agency in Orange County, Florida permits the use of a TASER when a suspect is merely passively resisting arrest.[146] Only two of the seven agencies placed the TASER on the same level as impact weapons like batons, which can only be used when the "officer perceives the situation as

139. *See id.* (explaining operation of use-of-force continuum).

140. *See* I.R.S. Manual § 9.2.3.3.1 (defining four categories of weaponless control: cooperative controls, contact controls, compliance techniques, and defensive tactics).

141. *See* GAO REPORT, *supra* note 28, at 7 (commenting that though none of agencies had separate use-of-force policies tailored to TASERs, all had general use-of-force policies to provide officers with "guidance on the circumstances in which the use of Tasers may be appropriate").

142. *Id.* at 8 (reporting that each of seven agencies had incorporated TASERs as another aspect of training in their use-of-force policies).

143. *See id.* at 7 (explaining how each agency had incorporated TASERs into existing use-of-force policies consisting of mace, pepper spray, batons, firearms, etc.).

144. *See id.* at 9 (documenting where each agency had placed TASER on its use-of-force model). Grouping TASERs in with other non-lethal weapons, like pepper spray, leaves TASERs in a "legal grey zone, where much of the regulation is settled in case law rather than state legislation." *See* Spriggs, *supra* note 21, at 497 (indicating a "disparity in the utility and effect of the various non-lethal weapons" when grouping them all together rather than regulating their specific uses and effects).

145. *See* GAO REPORT, *supra* note 28, at 9 (reporting that four of seven agencies placed TASER on same level as mace and pepper spray, allowing officers to use TASER if suspect is actively resisting arrest but not attacking officer).

146. *See id.* (explaining that by allowing passively resisting individuals to be TASERed, agency warrants TASERing suspect merely for failing to respond to verbal commands of officer).

potentially harmful, as when a subject engages in assaultive behavior that creates a risk of physical injury to another."[147]

Incorporating TASERs into current use-of-force policies creates two problems.[148] The first problem is that the great variation across law enforcement agencies as to where the TASER is placed on their use-of-force continuum requires courts to assess each individual policy when deciding whether an officer behaved reasonably.[149] This leads to confusion and inconsistent results; in many instances, courts have held an officer's use of force unreasonable even when the officer acted in accordance with law enforcement TASER policy.[150] The second problem is that when TASERs are incorporated into existing policies they have been placed far too low on the use-of-force scale, resulting in very little training.[151] Of the seven

147. *See id.* (explaining that "instances in which a suspect attacks or threatens to attack an officer by fighting or kicking" would be examples of behaviors that would warrant TASER usage by officers). Many courts are in agreement that assaultive behavior almost always merits use of the TASER, and that officers act reasonably by resorting to TASERing if faced with such behavior. *See* Fabian, *supra* note 23, at 783 (attempting to reconcile holdings of lower courts applying multifactor balancing test by separating results into situations where individuals were passively resisting or actively resisting arrest).

148. For a discussion of why it is not advisable to include the TASER in current use-of-force policies, see *infra* notes 150-53 and accompanying text.

149. *See, e.g.*, Neal-Lomax v. Las Vegas Metro. Police Dep't, 574 F. Supp. 2d 1170, 1184 (D. Nev. 2008) (reasoning that while police departments' "policies or training materials are not dispositive on the constitutional level of reasonable force, courts may consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable"), *aff'd*, 371 Fed. App'x 752 (9th Cir. 2010). The court in *Neal-Lomax* upheld an officer's use of a TASER seven times on a suspect actively resisting while under the influence of PCP, noting that the officer's actions were consistent with his training, he had warned the suspect each time before TASERing him, and each time the officer applied the TASER it resulted in momentary compliance. *See id.* at 1185-86 (finding that reasonable officer in these circumstances could have believed his conduct was appropriate).

150. *See* Moretta v. Miami-Dade Cnty., No. 06-CIV-20467, 2007 WL 701009, at *8 (S.D. Fla. Jan. 23, 2007) (holding that officer could not rely on law enforcement policy to claim force was constitutional where reasonable officer would know that given totality of circumstances his actions were "excessive or in violation of individual constitutional rights, even if those actions were consistent with the policy"), *aff'd*, 280 Fed. App'x 823 (11th Cir. 2008). Nonetheless, many courts are in agreement that written policies guiding police action when deploying TASERs is preferable. *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1183 (N.D. Cal. 1995) (remarking that "[g]iven the substantial pain inflicted by the taser, and the still uncertain health risks, . . . clear written policy on use of the taser is critical, particularly since the taser itself can not be pre-programmed to regulate or register the length of the charge" (citation omitted)).

151. *See* Amnesty Int'l, *USA: Amnesty International's Continuing Concern About Taser Use*, at 19, AI Index AMR 51/030/2008 (Mar. 28, 2006), *available at* http://www.amnestyusa.org/pdf/AI_taser_rpt20061.pdf (condemning U.S. police departments for continuing to place TASERs too low on their use-of-force models, thus allowing for TASER use in situations where deadly force would never be warranted). "The Taser continues to be used as a routine force tool, not as a last resort where the only other option would be use of a conventional firearm." *Id.*

agencies observed, the report noted that only four to eight hours of training were required for an officer to carry a TASER as compared to sixty to 100 hours required for a firearm.[152] This lack of proper officer training as to when TASER use is appropriate has been criticized by international groups that urge banning or strictly limiting TASERs.[153]

B. *International Standards: Are TASERs a Form of Torture?*

Amnesty International has urged that all TASER usage stop until experienced medical personnel conduct independent studies regarding the true health effects of TASERs on the human body.[154] It also argues that use-of-force training should be tailored to international standards on human rights.[155] As one civil rights group has noted, "while the Taser is less deadly than a traditional firearm, it is hardly the non-lethal weapon its manufacturer promotes."[156] The rising number of TASER-related fatali-

152. *See* GAO REPORT, *supra* note 28, at 11-12 (reporting that such testing stresses "how to (1) properly handle the weapon, (2) locate the shot, (3) safeguard the Taser, (4) conduct proper function tests, (5) overcome system malfunctions in a timely fashion, and (6) perform post-Taser deployment actions"). The ACLU has raised concerns that the limited training required of officers in many jurisdictions is based almost exclusively on TASER International materials, which are often outdated and overstate the safety of the TASER. *See* ACLU REPORT, *supra* note 14, at 8 (indicating that reliance on these materials gives officers "a false impression of the risks of using Tasers on potential suspects" by encouraging "multiple uses of the weapon, downplay[ing] the risks of using Tasers on people under the influence of drugs, and misrepresent[ing] the few medical reviews that have been done on Tasers").

153. *See, e.g.*, Amnesty Int'l, *supra* note 5, at 67-68 (recommending suspension of all transfers and use of TASERs until independent medical studies are undertaken to learn true health effects of being shocked by TASER and urging those using TASERs to strictly limit them to situations where only other alternative is deadly force); *see also* ACLU REPORT, *supra* note 14, at 16 (recommending TASERs "only be used in life-threatening situations," which "may save lives while avoiding unnecessary deaths caused by Tasers," until independent testing of TASER safety has been completed).

154. *See* Amnesty Int'l, *supra* note 5, at 67-68 (specifying that independent studies require "medical, scientific, legal and law enforcement experts who are independent of commercial and political interests in promoting such equipment" and who would be more likely to assess TASER usage in light of international human rights standards rather than studies performed by TASER International and its affiliates, who have clearly biased interest in law enforcement purchasing their product).

155. *See id.* at 2 (noting that many agencies are "deploying tasers as a routine force option to subdue non-compliant or disturbed individuals who do not pose a serious danger to themselves or others," which in many instances violates international standards that "require that force should be used as a last resort and that officers must apply only the minimum amount of force necessary to obtain a lawful objective").

156. *See* ACLU REPORT, *supra* note 14, at 1 (taking issue with TASER International's continued promotion of TASERs as "Saving Lives Every Day" (quoting TASER International homepage)). The ACLU contends that TASER International's marketing practices are misleading because they encourage TASER usage in a broad range of circumstances when it is clear that "Tasers are used in situa-

ties only serves to reinforce this claim.[157] While many doctors are hesitant to attribute fatalities to being struck with a TASER, because there has been little independent study as to its effects on the body, one doctor has spoken out against the TASER by describing its effects as essentially playing Russian Roulette with the heart:[158]

> While the shock alone does not cause injury or death in most cases, it may be fatal if it hits the subject during the vulnerable period of the heart beat cycle, is used on particularly susceptible populations [people with heart problems or under the influence of drugs], or is used multiple times and for an extended time period.[159]

This misinformation about TASER safety is due in large part to law enforcement's reliance on materials provided by TASER International (the manufacturer) that overstate TASER safety and understate its risks.[160]

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tions in which officers would never—and could never legally—use a gun." *See id.* at 6 (reporting that TASER International does not limit its promotion of TASERs to situations where officers face "possible imminent death or grave bodily injury," when firearms would be allowed, but rather also promotes TASERs in "far less threatening situations ranging from the resistance or flight of unarmed suspects to verbal displays of hostility and non-compliance").

157. For a discussion of TASER-related fatalities and injuries, see *infra* notes 19-21 and accompanying text.

158. *See* ACLU REPORT, *supra* note 14, at 4 (explaining that multiple applications of TASER "increases the chance that the electrical charge will hit the heart in a vulnerable period" and comparing repeated TASER shockings to Russian Roulette because it is dangerous, and, "[a]t some point, you may hit that vulnerable period" (quoting Matthias Gafni, *Autopsy Reveals Taser Use*, VALLEJO TIMES HERALD, Jan. 6, 2005)).

159. *See id.* (indicating that "if the Taser sends its energy to the heart at the wrong time, the electricity may cause ventricular fibrillation, a state in which the heart muscles spasm uncontrollably, disrupting the hearts [*sic*] pumping function and causing death" (citing Russel Sabin, *Heart Expert Warns About Using Tasers*, SAN FRANCISCO CHRONICLE, Jan. 5, 2005, at B1)). The ACLU has noted that children are a particularly susceptible and vulnerable population "because the same amount of current is injected by the device, whatever the size of the person." *Id.* Thus, in a smaller person, the amount that is flowing into one space is much greater and therefore "any sort of damage that occurs will be greater." *Id.* (quoting Roger Barr, *Talk of the Nation*, NAT'L PUB. RADIO, Dec. 7, 2004)).

160. *See id.* at 10 (specifying one particular misrepresentation in Version 12 of TASER International's training materials, which states that TASER International "presents the 'independent conclusions' of studies that are actually not independent or are taken out of context"). Another study heavily relied upon by TASER International training materials was done by the U.S. Department of Defense (DOD), which concluded that "'Electro-Muscular Incapacitation (TASER) is likely not the primary causative factor in reported fatalities.'" *Id.* (quoting TASER Int'l, Taser X26 and Taser M26 Non-Lethal Weapons, Instructor Certification Course, Nov. 2004, at slide 172). That study, however, failed to disclose that TASER International officials, according to newspaper reports, "'not only participated in three panels to determine the scope of the study, analyze data and review findings, but also provided the bulk of research used in the study.'" *See id.* (citation omitted) (noting that DOD study even recognized that its findings were based on potentially inherent sources of bias).

Even the United States Department of Defense has come out and said that the records on which TASER International relied in drawing its conclusions about TASER safety "are not a statistically representative sample and are potentially influenced by a number of sources of bias."[161]

While TASER usage does not often lead to fatalities, its force should not be taken lightly.[162] One officer who was shot with a TASER said, "[i]t is the most pain I ever felt in my life. . . . I felt like my muscles were going to explode."[163] Another officer, who only received a one-and-a-half-second shock—as opposed to the normal five-second shock applied to suspects—compared the TASER shock to sticking a finger in a light socket over and over.[164]

It is reactions such as these that have led some law enforcement agencies to ban this "less than lethal" technology.[165] It is also the reason Amnesty International claims that United States law enforcement agencies are

161. *See* THE JOINT NON-LETHAL HUMAN EFFECTS CTR. OF EXCELLENCE, U.S. DEP'T OF DEF., HUMAN EFFECTIVENESS AND RISK CHARACTERIZATION OF ELECTROMUSCULAR INCAPACITATION DEVICE—A LIMITED ANALYSIS OF THE TASER 71 (2004), *available at* http://www.theiacp.org/LinkClick.aspx?fileticket=nhks8yxUZ3k%3d&tabid=301 (admitting that its findings should be viewed with caution because analysis relied on significant amount of data from TASER International, which had taken steps to procure certain reported testimony by offering free cartridges to police departments in exchange for reports).

162. For a discussion of why TASER usage should not be taken lightly, see *infra* notes 163-69 and accompanying text.

163. *See* John Monk, *Troopers Hurt in Taser Training*, THE HERALD, Sept. 19, 2010, at B1 (reporting that three officers out of three hundred being trained had been injured during TASER training, which exceeds TASER International's "own estimates of how frequently law enforcement officers are hurt nationally during training"). These injuries occurred despite TASER International's precautionary measures during officers' TASER training in which they are TASERed under "highly controlled circumstances. They aren't fighting back and they are supposed to be held so they won't fall and hurt themselves." *Id.* These results are puzzling because TASER International touts that 99.7% of 1,201 subjects in a medical study had no injuries or mild injuries, under circumstances which are not as highly controlled and more likely to produce injury. *See* William P. Bozeman et al., *Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Officers Against Criminal Suspects*, 53 ANNALS OF EMERGENCY MED. 480 (2009), *available at* http://www.ncbi.nlm.nih.gov/pubmed/19157651?dopt=citation (discussing results of study based on case studies of all TASER uses against criminal suspects in six United States law enforcement agencies).

164. *See* Amnesty Int'l, *supra* note 5, at 5 (compiling officer testimony of pain felt in response to "a fraction of the normal taser discharge" they have been subjected to at training seminars). A firearms consultant confirmed that "it is the most profound pain I have ever felt." *Id.* at 6. These reports tend to support Amnesty International's assertions that TASER usage is cruel, inhumane, degrading, and falls outside the bounds of appropriate conduct.

165. *See, e.g.*, ACLU REPORT, *supra* note 14, at 5, (quoting Newark Police Department Chief Ray Samuels who stated that his reservations about TASERs are that they can be deployed "absolutely within the manufacturer's recommendation and there is still the possibility of unintended reaction. I can't imagine a worse circumstance than to have a death attributed to a Taser in a situation that didn't justify lethal force. It's not a risk I'm willing to take.").

in violation of international law, which states that "[n]o law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment . . . ."[166] Other international communities have taken heed to these warnings of abuse and strictly tailored their TASER policies.[167] The United Kingdom, for instance, only allows TASERs to be used by authorized firearms officers, and the TASERs are placed in a firearms box and issued only in appropriate situations in which an officer faces a threat of deadly force.[168] This standard better accounts for the health risks and civil rights implications of using TASERs.[169]

V. WHERE DO WE GO FROM HERE?

A. *Recommendations for Safer TASER Outcomes*

Muddled case law, inconsistent police policies, and lack of state regulation has led to a conflicting and misleading understanding of appropriate TASER usage.[170] A clear and unambiguous standard is needed to guide both law enforcement and courts in the reasonable use and assessment of the TASER.[171] The first problem that needs to be addressed in TASER regulation is the idea that law enforcement can regulate itself.[172] As one scholar has noted, police cannot be trusted to regulate themselves; self-regulation has proven ineffective time and time again.[173]

The federal government is in the best position to create a uniform national policy to regulate TASERs, but so far it has largely deferred to the

166. *See* G.A. Res. 34/169, art. 5, U.N. Doc. A/RES/34/169 (Dec. 17, 1979) (defining permissible conduct of law enforcement based on international civil rights standards).

167. *See, e.g.*, Amnesty Int'l, *supra* note 5, at 8 (comparing United Kingdom procedures for using TASER only when officers are faced with deadly force with U.S. standards, which permit "use in much broader circumstances").

168. *See id.* at 8 (favoring United Kingdom's more narrowly tailored TASER policy).

169. *See id.* at 10-11 (reporting that "improved policies, training and oversight have been shown to be critical factors in reducing police shootings and injuries to suspects or officers").

170. For a list of suggested recommendations on how to remedy the inconsistencies in case law and law enforcement regulations, see *infra* notes 170-97 and accompanying text.

171. *See* Spriggs, *supra* note 21, at 511-12 (acknowledging certain ACLU and Amnesty International recommendations to limit TASER use to only situations in which officers would be authorized to use lethal force as well as stronger regulations against TASERing vulnerable individuals).

172. *See* Schwartz, *supra* note 52, at 1079 (finding Supreme Court's premise that law enforcement can regulate itself as unfounded because law enforcement cannot be expected to "discipline officers for constitutional violations that officials know nothing about").

173. *See id.* at 1078-79 (concluding that qualified immunity is not as necessary as Supreme Court has urged, because threat of lawsuit has often made very little difference in law enforcement agency procedures).

states to fill this void.[174] States are in a unique position to create specific minimum standards for TASER use upon which both officers and civilians can rely.[175] Florida's statute provides a useful example of this type of regulation because it clearly identifies when a TASER is appropriate and what level of resistance by a suspect is required in order to use a TASER.[176] These statutes should also set a specific number of times an individual can be shocked with a TASER to avoid the Russian Roulette effect described above.[177] Even TASER International has admitted that multiple shocks "may impair breathing and respiration."[178] In an ACLU study of fifty-four agencies in California, only four had any policy that warned against or prohibited multiple shocks.[179] This is a serious problem because many of the fatalities associated with TASER use have involved repeated shockings.[180] In addition, an effective statute would include some warning or prohibition against TASERing vulnerable individuals—those at the extremes of age (youth or elderly), along with pregnant individuals.[181]

Another scholar has noted that courts could alleviate some of the confusion surrounding TASER regulation by strictly enforcing the three-prong *Graham* test set down by the Supreme Court.[182] Many courts have deemed TASER usage reasonable even where a suspect was not actively resisting or posing a threat to officers, which are elements the *Graham* test

174. *See* GAO REPORT, *supra* note 28, at 17 (indicating that federal government has regulated only in regards to Army usage of TASERs and that Transportation Security Administration also has authority to carry TASERs).

175. *See* ACLU REPORT, *supra* note 14, at 15 (urging that states create some "baseline standards on the use of Tasers" or at very least "take steps to minimize the risk of death and serious injury from Taser use"). For example, states have established such standards by "regulating the number of shocks that can be administered on an individual, the use of Tasers on juveniles, the elderly, pregnant women, and people known to be under the influence of drugs, the use of tasers on handcuffed and unconscious individuals, and on passive resisters". *Id.*

176. *See* FLA. STAT. § 943.1717(1)(a)-(b) (2006) (providing specific TASER deployment guidelines for law enforcement).

177. *See* ACLU REPORT, *supra* note 14, at 12 (finding that vast majority of police departments in California had no limitation on number of times individuals can be shocked).

178. *See id.* (quoting TASER INT'L, Training Bulletin 12.0-04, June 28, 2005).

179. *See id.* (indicating need for regulation as dearth of policies exists).

180. *See, e.g., id.* at 3 (reporting on death of twenty-one-year-old Andrew Washington after being shot with TASER seventeen times in span of only three minutes).

181. *See, e.g.*, Amnesty Int'l, *supra* note 5, at 32 (indicating that Portland, Oregon police amended their TASER policies after paying out large settlement to restrict TASER usage on elderly, children, and pregnant women).

182. *See* Spriggs, *supra* note 21, at 500 (analyzing *Graham* factors and noting that if courts applied test strictly it is unlikely that shocking vulnerable individual (youth, elderly, visibly pregnant) would be deemed reasonable because they likely would not cause any true threat of danger to officer).

requires if strictly applied.[183] In other words, a restrained individual would not be a threat to officers, and therefore TASER usage would not be warranted.[184]

Furthermore, proportionality is an important factor that must be considered when crafting laws and policies that govern TASER use by law enforcement officials.[185] Excessive force lawsuits are brought specifically because victims do not believe that the use of force against them was proportional or necessary—they believe it was excessive.[186] One factor that courts often consider when deciding if an officer's use of force was reasonable is whether a warning was given.[187] A warning to suspects should be mandatory before firing a TASER whenever it is possible, and so long as it would not be futile, in order to give a suspect the opportunity to stop resisting and follow orders.[188]

Lastly, a vital recommendation called for by Amnesty International, and seconded by many law enforcement agencies, is independent medical testing of TASERs.[189] These tests are necessary to learn the true health implications a TASER has on the body, specifically when used against individuals with heart problems or under the influence of drugs.[190] As many of the studies in this Note have cautioned, much of the available statistical data on TASER safety was created by TASER International, which has a vested interest in selling its product, and therefore, may be biased in the data it presents.[191]

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183. *See, e.g.*, Buckley v. Haddock, 292 F. App'x 791 (11th Cir. 2008) (finding officer's TASERing of individual reasonable despite fact that he was arguably not threat to officer and was not actively resisting).

184. *See* Spriggs, *supra* note 21, at 500 (explaining that restrained individual would "likely pose less of a threat to the officer or others, thus affecting the three factor balance").

185. *See* Fabian, *supra* note 23, at 792-93 (reasoning that "[w]hen officers use force that is disproportionate to the threat, it can spark fear, anger, and even protests that degrade law enforcement's relationship with the community").

186. *See id.* at 793 (finding that "[i]t runs contrary to many people's expectations about what constitutes reasonable force to allow officers to Taser passively-resisting suspects who pose no threat to the officer or others").

187. *See* Autin v. City of Baytown, 174 F. App'x 183, 185 (5th Cir. 2005) (emphasizing that officer TASERed suspect when her back was to him and without giving her proper warning).

188. *See* Sam W. Wu, Case Summary, *"When Can I Tase Him, Bro?": Bryan v. McPherson and the Propriety of Police Use of Tasers*, 40 GOLDEN GATE U. L. REV. 361, 375 (2010) (noting that lack of warning by officer when he had ample time to do so was determinative factor in Ninth Circuit finding that officer's TASERing was unreasonable).

189. *See* Amnesty Int'l, *supra* note 5, at 67-68 (urging further investigation of health effects of TASER usage and halting of all TASER usage until then).

190. *See id.* (presuming fatalities related to TASERing drug-induced and mentally ill persons are more than coincidence and must be investigated).

191. *See, e.g.*, ACLU REPORT, *supra* note 14, at 10 (noting DOD's disclaimer that much of data relied on by TASER International had potential for bias).

B. *Conclusion*

The growing number of fatalities associated with TASER usage as more law enforcement agencies implement them cannot be a mere coincidence.[192] Law enforcement has often been overzealous in its use of the TASER in situations in which a TASER has clearly not been warranted.[193] Whether this was due to ignorance or just plain confusion as to the appropriate circumstances for employing a TASER, law enforcement cannot be expected to know in every instance when a TASER is appropriate without some clear, unambiguous guidance from either courts, states, or the federal government.[194] Ideally, a bright-line rule from the Supreme Court could create a clear, uniform national standard that would guide both officers and courts.[195] This result is unlikely to be forthcoming, however, because the Court has stated that "'reasonableness under the Fourth Amendment is not capable of precise definition.'"[196] If the federal government is going to continue to defer to the states on this issue, then the states are in a unique position to fill the void in TASER regulation and alleviate the confusion as to when TASERs are warranted.[197]

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192. For a discussion on TASER-related fatalities and opposing viewpoints taken by civil rights groups and TASER International as to the cause of such fatalities, see *supra* notes 18-21 and accompanying text.

193. *See, e.g.*, ACLU REPORT, *supra* note 14, at 3 (reporting that officers TASERed suspect seventeen times in span of only three minutes).

194. *See* Schwartz, *supra* note 52, at 1079 (supposing law enforcement is not in position to regulate itself when constitutional interpretations by courts are ambiguous and inconsistent).

195. *See* Fabian, *supra* note 23, at 793 (indicating that while bright-line rule from Supreme Court would be best solution to combat current inconsistencies in case law arising from *Graham*, it is unlikely Supreme Court will lay down such standard).

196. *Id.* (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)) (concluding bright-line rule is not forthcoming).

197. *See id.* (stating that federal law does not currently restrict TASER usage so states are in position to adopt "more restrictive standards while still staying within the boundaries of the Fourth Amendment").